In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 867

ANTHONY J. SCHERER, PETITIONER

v.

KENNETH MORROW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 5-11) is unreported. The opinion of the court of appeals (Pet. App. 1-2) is reported at 401 F. 2d 204.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1968. The petition for a writ of certiorari was filed on December 23, 1968. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the allegedly defamatory statements made by a Secret Service agent were privileged under *Barr* v. *Matteo*, 360 U.S. 564.

STATEMENT

Petitioner's complaint, seeking $100,000 in damages, alleged that respondent, an agent of the United States Secret Service, had made slanderous statements respecting him in an appearance before a class of cadet officers of the Chicago Police Department. On the basis of the uncontroverted affidavits of respondent and his superior, the district court concluded that the alleged statements were privileged under *Barr* v. *Matteo*, 360 U.S. 564, and granted summary judgment for respondent. The court of appeals affirmed.

The affidavits filed on respondent's behalf stated that he had been assigned by his superior to deliver a lecture to the class of cadet officers on the duties and activities of the Secret Service in order to facilitate their cooperation with and support of the Service (Pet. App. 9). The standard lecture given by respondent included comments on Presidential protection. During the question and answer period which followed the lecture, one of the cadet officers asked a question concerning petitioner, a resident of the Chicago area who had been the object of special security precautions to protect President Johnson dur-

ing a 1964 visit to Chicago.[1] According to the complaint, respondent asserted in answering the question that petitioner was a "nut" and inaccurately described petitioner's conduct and the nature of the security precautions taken during the President's visit (Pet. 3).

The district court granted summary judgment for respondent. Pointing out that petitioner's own affidavit did not "challenge [respondent's] actions as being outside the scope of his official duties," and that the uncontroverted affidavits filed on respondent's behalf established that respondent "was acting within the line and scope of his official duties", the court ruled that the alleged statements were privileged (Pet. App. 9, 11). The court of appeals affirmed, one judge dissenting.[2] It noted that respondent's alleged statements had been made in response to a question and only for the purpose of using a pertinent local incident to demonstrate the functions of the Secret Service (Pet. App. 2).

ARGUMENT

This Court, recognizing that federal officials must be free to perform their official duties without fear

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[1] Those precautions were the subject of a prior unsuccessful suit brought by petitioner against other agents of the Secret Service. *Scherer* v. *Brennan*, 266 F. Supp. 758 (N.D. Ill.), affirmed, 379 F. 2d 609 (C.A. 7), certiorari denied, 389 U.S. 1021.

[2] The majority opinion noted that Judge Schnackenberg, who had heard the oral argument but died prior to the adoption of the opinion, had been of the view that the judgment of the district court should be reversed.

that they may be subjected to tort liability, has ruled that they may not be held personally liable for acts committed within the general scope of their official authority and in pursuance of their official duties. *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593. This immunity exists if the act complained of was performed "within the outer perimeter of [the official's] line of duty * * *" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 575).[3] In this case, both courts below correctly applied these settled principles to the undisputed facts.

In performing its duty to "protect the person of the President" (18 U.S.C. 3056), the Secret Service relies heavily on the cooperation and support of local law enforcement officials and organizations. The Secret Service Manual stresses that it is "always * * * paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation" and that such organizations "must have as much information as necessary in order to carry out their support function" (Section 911.1, Pet. App. 8). The Manual specifically permits unlimited remarks on Presidential protection in training lectures before law enforcement groups (Section 912.2, Pet. App. 9).

These provisions leave no doubt that delivering a

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[3] Contrary to petitioner's apparent belief (Pet. 12-13), the application of the official immunity doctrine does not depend upon the rank of the official. *Barr* v. *Matteo*, *supra*, at 572-573. Nor, as the *Barr* case itself reflects, does an allegation that the allegedly defamatory statements were made maliciously render the doctrine inapplicable. See 360 U.S. at 568, 576.

lecture to a training class of Chicago police cadets and answering the cadets' questions was a properly authorized part of respondent's official duties.[4] Respondent's activities contributed to the development of a close working relationship with the Chicago police, and furnished the police cadets with information about Secret Service activities necessary to enable them to provide effective assistance. Furthermore, in responding to a cadet's question with reference to petitioner's conduct during the Presidential visit to Chicago, respondent discussed a recent incident illustrating the Secret Service's Presidential protection functions in a context familiar to the Chicago police cadets.[5]

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[4] Petitioner's contention (Pet. 8, 10) that it was not part of respondent's duties to engage in a question and answer session ignores that such a session is a usual concomitant of lectures to small groups, and it was the normal practice for the respondent to entertain questions following his lectures. Since the information contained in the alleged remarks was relevant to the subjects about which respondent was directed to inform the police cadets, the fact that the respondent communicated that information during the question and answer session, rather than during the lecture proper, is of no significance in determining the applicability of the privilege.

[5] Petitioner's request that this case be consolidated with *Willingham* v. *Morgan* (No. 228, this Term), certiorari granted December 9, 1968, ignores that, although the official immunity doctrine was considered by the lower courts in *Willingham*, the questions presented to this Court by the government's petition for certiorari concern only the removal to a federal court, under 28 U.S.C. 1442 (a)(1), of actions brought against federal officials in a state court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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